No. 637.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

In the Matter of
WOEY HO,
on Habeas Corpus.

PETITION FOR REHEARING

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..... *Clerk.*

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Comes now the petitioner and appellant herein, and respectfully petitions this Honorable Court that she may be allowed a re-hearing on the following questions involved in the decision of the said matter:

I.

It was urged by the appellant that the lower court erred in remanding Woey Ho to China. It was and is admitted by the petitioner that the lower court could enter one of two decisions in this matter. Either hold that her detention was illegal and order her discharged from custody; or, to hold that her detention was legal and order her returned to the custody from where she

was taken, which, as the petition shows, was the Occidental and Oriental Steamship Company, by its manager, D. D. Stubbs.

Transcript of Record, page 2.

The lower court did not do this. It made an order remanding petitioner to China.

Transcript of Record, page 36.

It is contended by appellant that the lower court exceeded its jurisdiction in making this order which is without the pleading in this matter. The court may prevent an alien from entering this country, but there its power ends, and it cannot do more than that and direct where the alien shall be sent. The court has nothing to do with the alien except to order that he has no right to be or remain in the United States. It is no concern of the courts what becomes of the alien just so long as he does not enter these United States in violation of its decree. This matter is different from a deportation proceeding, for there the person may be adjudged to be unlawfully in the country and the statute gives the court the power to return such a defendant to China. That is a power created by statute and applies only to Chinese arrested for being unlawfully in this country and has no force or effect in a proceeding of this character, which is to determine citizenship upon an application to re-enter this country. The legislative branch of the government did not extend those provisions to cases such as the one at bar and appellant contends that the courts are powerless to

act under that statute in a case of this kind. Appellant asks that if the order appealed from is not eventually set aside for the reasons hereinafter mentioned, that it be modified as urged by appellant. This point, though urged by appellant, was not decided by this Honorable Court in its decision upon this appeal.

II.

It was urged by appellant that the lower court erred in ruling that the statute makes it the duty of the court to presume that the petitioner was born in China. This point was not decided by the appellate court.

The statute referred to by the lower court, I ascertained by referring to "In re *Jew Wing Loy*, 91 Fed. Rep. 240", decided by the judge of the court from whose decision this appeal is taken. It is Section 3 of the Act of May 5th, 1892, entitled, "An Act to prohibit the coming of Chinese persons into the United States", and is an act supplemental to and amendatory of the Exclusion Act. This section of the act applies only to Chinese persons, or persons of Chinese descent, arrested for being unlawfully within the United States. Section 5 of the same act makes provision for habeas corpus cases. Congress in its wisdom did not extend the provisions enumerated in Section 3 and applicable to persons arrested for being unlawfully in this country, to persons seeking to land in the United States by a writ of habeas corpus and provided for in Section 5 of the

same act. The lower court's action in so doing appears to us to be an exercise of legislative power rather than judicial authority. The two sections are as follows:

> "Sec. 3. That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.
>
> "Sec. 5. That after the passage of this act, on an application to any judge or court of the United States in the first instance for a writ of habeas corpus, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly without unnecessary delay."

It is obvious to all that these two statutes do not apply to Chinese citizens of this country for it would be a class discrimination between citizens whom the Constitution guarantees shall enjoy equal liberty, justice and freedom. It might not be amiss to state that Section 5 is now entirely inoperative, having lost its field of action by virtue of the Act of August 18, 1894, which made the decision of the appropriate immigration or customs officers final unless reversed on appeal to the Secretary of the Treasury, in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made.

This is an action to determine citizenship and such a

construction as the lower court placed upon these statutes, we contend would be in direct conflict with the Constitution of the United States and the Fourteenth Amendment thereof. The testimony is to the effect that the appellant was born here and hence a citizen. The lower court claims that there is a statutory presumption that the petitioner was born in China which must be overcome whether she was born here or not. This statutory presumption claimed by the lower court does not apply to any but Chinese or persons of Chinese descent, other than citizens, who are arrested for being illegally in this country. This is as clear a case of affirmative error as it would be possible to find in any case. The statute relied upon by the lower court is a part of the exclusion acts, and any and all parts of them are not applicable to citizens of this country, or in action to determine such citizenship.

Gee Fook Sing vs. *U. S.*, 1 C. C. A. 212;
In re Look Tin Sing, 21 Fed. Rep. 905;
Ex parte Chin King, 35 Fed. Rep. 354;
In re Yung Sing Hee, 36 Fed. Rep. 437;
In re Wy Shing, 36 Fed. Rep. 553;
U. S. vs. *Lee Seick*, 100 Fed. Rep. 398.

III.

It was urged by appellant that the lower court erred in disregarding the unimpeached testimony of the witnesses introduced on behalf of the petitioner, and in arbitrarily refusing to believe their testimony. The

decision of this Honorable Court sustains appellant's assignment in point of law as the following will show:

> "The question whether a witness is credible must ordinarily be determined by the tribunal before whom the witness appears and in the decision of which that tribunal must necessarily be vested with a very wide discretion. In weighing the scales, the conduct, manner and appearance of the witnesses as seen by that tribunal often forms an important factor in enabling courts, as well as juries, to determine whether or not a witness is entitled to credit. Appellate courts are, in the very nature of the case, deprived of the opportunity to apply this test which in a doubtful case might control the judgment of a trial court." And the decision also states that: "A court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a Negro or a White man. All people without regard to their race, color, creed or country, whether rich or poor stand equal before the law. It is the duty of the courts to exercise their best judgment, not their will, whim or caprice, in passing upon the credibility of every witness."

This Honorable Court quotes two decisions in its opinion to show that appellant's assignment was not well taken in point of fact. The first is *Quock Ting* vs. *U. S.*, 140 U. S. 417. The petitioner in that case was a boy who claimed to have been born and to have lived in this country for ten years and to be just returning from a six years' visit to China. The writ was taken out in the Circuit Court for the Northern District of California, and the case is numbered 6314. The petitioner and his father were the only witnesses and

their testimony consists of just twenty-six answers to as many questions and the testimony does not cover four pages of regular typewriting paper, double spacing. The Circuit Judge who tried the case made no comments. I state these facts and earnestly ask this Honorable Court to look into the record of that case so that the Supreme Court's decision may be better comprehended. That decision is in part that:

> "A boy of any intelligence arriving at that age, would remember, even after the lapse of six years, some words of the language of the country, some names of the streets or places or some circumstances that would satisfy one that he had been in the city before. But there was nothing whatever of this kind shown. He gave the names of no person he had seen; he described no locality or incident relating to his life in the city nor did he repeat a single word of the language, which he must have heard during the greater part of several years, if he was there. The testimony of the father was also devoid of any incident or circumstance corroborative of his statement. * * * If the petitioner was really born in the United States, and had lived there during the first ten years of his life, the fact must have been known to some of the father's neighbors, and incidents could readily have been given which would have placed the statement of it beyond all question. It is incredible that a father would allow the exclusion of his son from the country where he lived, when proof of his son's birth and residence could have been easily shown, if such in truth had been the fact."

The case at bar is replete with such incidents as are contemplated in the above decision. The testimony

covers more than eight times as much space as in the *Quock Ting case* while there are fully sixteen times as many questions. Neighbors were produced who gave their testimony in this case. The testimony in the *Quock Ting case* was a mere skeleton such as might be made out by any impostor while the case at bar, on the contrary, covers every point and does not rest alone on the father's and son's testimony as in the *Quock Ting case*, but upon the petitions, her uncles, and two disinterested witnesses' testimony. There is no comparison between the records of these two cases, the one is as apparently fraudulent as the other is genuine in my opinion. Even such as the *Quock Ting case* was, Mr. Justice Brewer wrote a very strong dissenting opinion in which he said in part:

> "I am unable to agree with the conclusions reached by the court. They seem to me to be in the face of positive, unimpeached and uncontradicted testimony. * * * If the government, through its counsel, wished to discredit his testimony it was its province, on cross-examination, to question him as to his knowledge of various localities in San Francisco, and of events which happened during the time he claimed to have resided there * * * No attempt was made to contradict either father or son, or impeach either, unless the ignorance of the English language is to be considered as impeachment. The government evidently rested on the assumption that, because the witnesses were Chinese persons, they were not to be believed. I do not agree with this."

In *Lee Sing Far* vs. *U. S.*, 94 Fed. Rep. 834 the facts are quite as inapplicable. I set forth the findings of the

referee who tried the case which are as follows:—

"The Referee: I took these papers home with me last night, and devoted more than an hour's study to them. I have come to the conclusion that I must remand the petitioner. I do it mainly upon the ground that there is no sufficient identification of her. This may be a new departure. The want of identification certainly, in this case, calls for it in this: 'She left here when she was between two and three years of age; she went with her father and mother and two sisters to China, and that her father, after remaining there two or three years, more or less, returned to California, and has not seen her since until her arrival here. Hence, he could not have known, even by seeing her, that she was his child, who left here in 1882. He says he knows her by a photograph which came with her. The photograph which came with her is the photograph of her as she is to-day, not as she was at any intervening period of her life. The statements of her two witnesses, Low Jew and Leong Lai, are singularly alike. The girl that was sewing in 1891, when Low Jew saw her, was sewing in 1896 and 1897 when Leong Lai saw her. She was sewing both times when each of these witnesses saw her. Each of them went to the mother's house, where they testified they saw her upon the first visit, to deliver a letter which they testified the father had sent with money to the mother. The second time, when each of them made a visit, they went to inquire or to receive a letter from the mother to take to the

father in California. They only stayed each time long enough to do their errand and return. The girl was sewing. She did not speak to them. They did not speak to her. She did not speak to anybody. They did not hear her voice. How, I inquire, in all reason, is it possible, by such testimony, to establish the identity of the petitioner?

"AGAIN: As I have said in repeated cases, where the statement of the petitioner is read back to the petitioner, that in such cases I should hold them strictly to the statements made in the Bureau, because in such cases they have had a full opportunity of knowing what the statements were. The chances of being misunderstood have been diminished, if not wholly taken away, and therefore we give effect to them. Such is the case here.

"Counsel for the petitioner yesterday claimed that in her statements she had reference to three different parties, whom I understand to be Lew Jew, Leong Lai, two of the witnesses, and Low Ming, whose name appears in her statements, but she did not say that she saw Low Ming, but that in the third month of this year her father wrote a letter and sent some money home by a man of the name of Low Ming for her to come home. When she is asked in the Chinese Bureau, 'Has anybody called on you in China from this 'country?' her answer was, 'No, no one at all. I 'recall now that there was a man, whose name mother 'did not give me, called at our house two years ago. 'This man did not see me, because I opened the door

'just a little bit, and through the crack only that I 'had a glimpse of him.' Then she is asked, 'Is he 'any relation of yours?' and she answers, 'No, he is 'a friend of father.' If there was any testimony at all as to who that man was, it must have referred to Leong Lai, who testified he was there in 1896 or 1898. No other person is referred to as having been there at that time. She, in her statements, says that Leong Lai, if it was Leong Lai—and I infer that it must have been—did not see her. Leong Lai testifies he did see her, and he saw her twice. She states further in response to this question and 'This man that went back 'to see you in China, how many times did he call at 'your house to see you?'

"'A. Two years ago he came twice; the last time 'was when he called to ask mother if she had any 'letters from San Francisco,' which I understood to be '"for" instead of "from"—but he did not see me any 'more the second time than he did the first.'

"There is a direct conflict between her statements made to the bureau, the testimony of the witness Leong Lai and her own statements given before me. I think I have said enough in this case to satisfy any person that, owing to the want of sufficient testimony to identify the petitioner, and these contradictions, that she ought to be remanded, and I so order.

"Mr. Mowry. No exception."

In the case at bar, the facts, if true, are amply sufficient to satisfy any one of the petitioner's right to enter

this country, and to warrant a reversal of the lower court's judgment. This being so, let us look at the facts. The testimony is probable, positive and direct; it is free from all fatal omissions, and the witnesses are and have been merchants of recognized standing for the past quarter of a century. That portion of Wong Quon's testimony mentioned in the opinion as not being above suspicion, is due more to the translation than anything else. The book could have been produced if time had been given to enable the witness to find it, as it had been packed away and stored with all the old books of his firm, some little time before the trial. This case was set for trial by the court on but one day's actual notice to petitioner, and hence we could not be expected to present a case that would show the evidence of a most careful and complete preparation. Some little allowance should be made on this account. At best this is but an improbability and no impossibility being shown, it should be accepted. There are twenty-six cases on this point set out on pages 23 and 24 of appellant's brief.

This Honorable Court states in its decision that the credibility of each witness must be determined separately and yet no reason appearing of record is mentioned for disregarding all the other witnesses testimony in this case, excepting Wong Quon.

This Honorable Court states in its opinion that "a "court is not at liberty to arbitrarily and without "reason reject or discredit the testimony of a witness

" upon the ground that he is a Chinaman. * * *
" All people, without regard to their race, color, creed
" or country, whether rich or poor, stand equal before
" the law." Did the lower court act in accordance with this? Let us see.

The lower court announced certain rules it should be guided by in cases of this character. In the case of *Jew Wing Loy*, 91 Fed. Rep. 240, I quote the last part of the decision:

> "Congress has not, however, enacted that when a person of Chinese descent claims to have been born in the United States he must establish such fact by testimony of witnesses other than Chinese. This omission cannot be supplied by the courts, and therefore Chinese persons are competent witnesses in cases of this character, but their credibility is for the court to determine in each case and in a proceeding like this, where only this class of witnesses testify that the Chinese person applying for admission into the United States is a native of this country, unless the court is fully satisfied of the truth of such testimony, its finding should follow the presumption that a person coming from China, and seeking to land in the United States, is an alien and not a native-born citizen of this country. The exceptions will be overruled."

In the case of *Hui Gnow Doy*, 91 Fed. Rep. 1006, the lower court rendered the following decision:

De Haven, District Judge. "I have fully discussed in the opinion this day rendered *in re Jew Wong Loy*, 91 Fed. 240, on *habeas corpus*, the rule by which the Court should be governed in disposing of cases of this character, where the claim made by the petitioner is

supported only by the testimony of Chinese witnesses. It will only be necessary, therefore, for me to announce my conclusion in this case, which is that I am not satisfied, from the evidence submitted, that the petitioner was born in the United States, as claimed by him. The testimony of the petitioner and his witnesses was devoid of any reference to any incident or circumstance by means of which their evidence in relation to the place of petitioner's birth could be either corroborated or impeached. The naked testimony of these witnesses, unsupported by any fact or circumstance, does not furnish to my mind satisfactory proof that the petitioner is entitled to remain in the United States. Petitioner will be remanded to the custody whence he was taken, for the purpose of being deported to China."

The object of these references is to shed all the light possible upon the reasons which actuated the lower court to disbelieve the witnesses in this case. The record disclosed no reason nor did the lower court assign any. Fortunately, the lower court has announced the rules it would be governed by in weighing the evidence in cases of this kind.

Now, then, appellant asks this Honorable Court to decide whether or no, influences or prejudices of race, color, creed or country were factors that militated against this appellant in the mind of the honorable lower court when he weighed the evidence.

The honorable lower court announced in the two cases above quoted what rules would govern in the

trial of cases of this character and the extracts of the lower court's decisions which are quoted above seem to us to be strikingly at variance with the law as stated above from this appellate court's opinion, and we claim it as affirmative error.

The affirmative, direct and positive testimony of four unimpeached witnesses has been set aside and utterly disregarded by the lower court. There is no reason for this upon the face of the record, for the testimony is as reasonable and probable as the human conception can contemplate. This Honorable Court decided that it was optional with the lower court, whether to assign reasons for its action or not. Each of the witnesses gave his or her testimony through the medium of an interpreter in a language unknown to the lower court, and sitting in a position, when speaking to the interpreter, so that their faces were turned away from the court, no stress, therefore, can be reasonably placed upon their manner of testifying.

We think that "the border line, beyond which courts " must not go", has been crossed in this case.

We claim affirmative error in this, that the lower court claimed the existence of a statutory presumption that appellant was born in China and which had to be overcome before he could decide in appellant's favor.

We also claim affirmative error in this, that the lower court was governed in its deliberations by a previously expressed rule which is, we contend, con-

trary to the law as decided by this court that

> "All people, without regard to their race, color, creed or country, whether rich or poor, stand equal before the law."

We also claim affirmative error in this that the lower court acting under the alleged statutory presumption that petitioner was born in China and acting under its rule which applies only to Chinese, did not act under the presumption that all witnesses are credible and hence could not with justice to petitioner weigh the evidence in her case as we contend it should be weighed.

The conduct, manner and appearance of the witnesses often form an important factor in enabling courts and juries to determine credibility, and it is a test which in a doubtful case might control the judgment of a trial court. That is the law as decided in the *Quock Ting case* by the Supreme Court. That case was the veriest skeleton of a bona-fide contention and one must see the record in that case to comprehend the force and meaning of the court's decision. It can have no application in this case for of record it is a probable and not a doubtful case. Petitioner's case was just such a case as a person born here could make out upon a trial of that fact. It withstood the test of a cross-examination by a man of experience in these cases. The government is not powerless in these cases. In the practical administration of justice in these matters, the decisions are always the result of a firm conviction in favor of

the applicant or against him. The test of a severe cross-examination always separates the bad from the good and places of record contradictions and inconsistencies which dispel all doubts but that justice was done in remanding the petitioners, or it places of record incidents and matters which establish beyond all question that the petitioners were born here. In the *Lee Sing Far case* counsel representing the petitioner in the trial agreed with the referee's decision and took no exception to the decision.

If the manner and conduct and appearance of a witness could be alone sufficient to discredit him, how could the decision of a judge or jury ever be set aside when the evidence consisted alone of testimony? We think their importance overestimated. These features are eliminated by taking depositions and by taking testimony on a reference. The lower court did not decide that the manner, conduct and appearance of the witnesses was his reason for disbelieving them. It seems to us to be only a conjecture to supply that as the reason now, for if these reasons actually existed and were of enough importance to destroy the credibility of each and every witness, the lower court, it seems to us, would have so stated in its concluding observations on the case and its failure to do so forces us to an opposite conclusion. Our entire judicial system is composed of a series of checks, one upon the other, as a protection to the public from unwarranted acts. We do not think it was ever the intention of the law

that the manner, conduct and appearance of a witness would be alone sufficient to discredit him, for if this were so, it could be successfully urged in support of the finding of every judge and jury who had in fact arbitrarily and without good and sufficient reason disbelieved or disregarded the testimony of a witness. In the case at bar this Honorable Court decided that the lower court was satisfied that the witnesses had been to China as they had testified. What reason is there for accepting part of the testimony and rejecting, disregarding, or disbelieving the remainder of it?

In conclusion we submit that this Honorable Court should permit us to be heard upon the points mentioned in this petition, for the case is one which this Honorable Court practically admits lies very close to the border line which courts must not cross, and these additional points, we contend, bring it over that line.

Respectfully submitted,
GEORGE A. McGOWAN,
Attorney for Appellant.

Certificate of Counsel.

I hereby certify that I am the attorney for the petitioner and appellant herein; that in my judgment this petition is well founded; and that it is not interposed for delay.

GEORGE A. McGOWAN,
Attorney for Appellant.